

Areeda and Herbert Hovenkamp, *Antitrust Law*, 1993 Supplement, Little Brown, 1993, at 808-14; Owen and Braeutigam, chap. 1). Connecticut has done none of the analysis necessary to demonstrate that the practices of which its resellers complain harm retail customers. Nor will regulation to protect the independent retailers necessarily help consumers.

53. Furthermore, regulation to protect resellers may harm consumers. If cellular carriers know that regulators will protect resellers, they may be unwilling to take steps that would reduce resellers' share of retail sales. Thus, they may prevent their own retail outlets from competing vigorously with resellers. In this case, regulation would prevent retail distribution from being done by the least-cost providers, to the detriment of subscribers.

54. Price discrimination is charging different prices to different customers for the same service in the absence of cost justifications. To determine whether there is discrimination, one must compare differences in prices with differences in costs. Connecticut has not compared allegedly discriminatory prices with costs to determine whether they meet the definition. Nor has Connecticut submitted evidence of such discrimination in states where regulation is today absent.

55. In any event, the issue here is not merely whether there is any price discrimination, but whether such discrimination if it exists is unjust and unreasonable. Discrimination is not necessarily bad; it sometimes promotes economic efficiency (F.M. Scherer and David Ross, *Industrial Market Structure and Economic Performance*, Houghton Mifflin, 1990, at 494-502; Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization*, Scott, Foresman, 1990, at 448-451). Furthermore, regulatory restraints on price discrimination can make anticompetitive behavior more likely. For example, restrictions on price discrimination in the Interstate Commerce Act of 1887 facilitated collusive pricing by U.S. railroads (Scherer and Ross at 501).

56. To determine whether discrimination is unreasonable from an economic point of view, one must analyze the effects of the discrimination

on economic efficiency and consumer welfare. Connecticut has not shown that discriminatory rates, if they exist, reduce consumer welfare.

57. Connecticut apparently is concerned that cellular carriers have an incentive to limit the ability of resellers to compete in retail sales. However, there is no persuasive evidence that exercise of market power by cellular carriers is a significant problem. Without such evidence, there is every reason to believe that, unless their incentives are distorted by government regulations, each cellular system has a powerful incentive to have each of the steps involved in providing service—including retail marketing as well as such things as call recordation and billing—done in the least-cost manner, whether this involves independent resellers or vertical integration or both. Minimization of costs contributes to profits both directly and by enabling the firm to reduce prices and increase sales. Under these circumstances, there is no reason to expect that decisions by CMRS providers relating to either bundling of services sold to resellers or prices charged to resellers will have an adverse effect on competition or consumer welfare.

58. To see why policy concern about resellers is misplaced, assume for purposes of this discussion that, absent regulation, the carriers would enjoy market power, and that independent resellers could perform an important competitive role in marketing mobile communications services. Even in these circumstances, the carriers would have no reason to engage in the behavior that Connecticut fears.

59. There are two reasons why Connecticut's concern is unwarranted. First, to the extent that the carriers have market power, there is no reason why they could not fully exploit that power by charging high prices for their service. Their market power would not be enhanced by the practices feared by Connecticut. Unless carriers were the least-cost providers of relevant services, they would not increase their profits by vertically integrating into retail marketing or by requiring resellers to purchase bundled services, including services such as call recordation, from them. Second, if the carriers attempted to squeeze resellers that could play an important competitive role in marketing their services, or that could perform ser-

vices such as call recordation at lower costs, this would increase the costs of providing services to consumers and reduce the quantity of mobile communications services sold, reducing the carriers' profits.

60. Furthermore, the share of independent resellers in retail sales has no direct implications for consumer well-being. In some markets suppliers are vertically-integrated into retailing, in some they use dual distribution systems and sell to consumers both directly and through independent resellers, in others they sell only through resellers, and in some markets some suppliers use one of these organizational forms and others use another. All these options are compatible with competition. If the share of resellers has been declining, the reasonable inference is that resellers are not as efficient as other forms of retail distribution. Consumers are not hurt when the relative use of an inefficient form of distribution declines. Policies to encourage inefficient distribution will hurt consumers.

61. The Connecticut petition expresses concern over sharing of information between the wholesale and retail levels of vertically integrated carriers. This reveals a serious misunderstanding. Presumably an important explanation for vertical integration in the cellular industry as in many other industries is that such integration is efficient. Where there are economies of vertical integration, perhaps resulting in part from lower costs of communicating information, it would not make sense to prevent their exploitation in order to protect non-integrated competitors. Such protection would increase costs and raise consumer prices.

G. *Conclusions on Market Structure and Performance*

62. Regardless of concentration levels, there is no sound empirical basis for a conclusion that cellular systems have been exercising significant market power. Little of the alleged evidence of anticompetitive behavior survives careful economic analysis. There is evidence of competition, and concentration will fall substantially over the next several years. Consequently, there is no empirical basis for believing that there is a problem with market performance that would warrant the substantial costs that would be imposed by Connecticut's regulation of CMRS pricing. Thus,

the Commission should continue its historical forbearance from economic regulation of this industry and should deny the Connecticut petition.

IV. Effectiveness of Regulation

63. Connecticut has presented no convincing evidence that its regulation of cellular carriers, or that of any state, has provided significant benefits to consumers.

64. Some states have been regulating cellular service prices while others have not. If price regulation benefited consumers, it should be possible for Connecticut to demonstrate that prices are just and reasonable in states with price regulation while they are not in states without such regulation, other things equal.

65. Connecticut has not attempted to provide such an empirical justification for rate regulation. In fact, a study by Hausman comparing prices in regulated and unregulated states shows that state regulation of the CMRS industry has *not* reduced prices. Prices were 5 to 16 percent higher in states that required advance notice tariff filings than in states that did not regulate prices (Hausman at 10).

66. The ineffectiveness of state regulation of the cellular industry is not surprising. In many other industries regulation has not helped, and in fact has harmed, consumers. Winston recently examined evidence on the effects of deregulation of industries including airlines, railroads, trucking, and telecommunications. He found that in each of these industries consumers were better off after deregulation (Clifford Winston, "Economic Deregulation: Days of Reckoning for Microeconomists," *Journal of Economic Literature*, Sept. 1993, at 1284).

67. In the period from about 1975 to 1984, the Federal government deregulated a number of industries on the basis of a consensus among scholars and policy makers that regulation, on the whole, failed to improve consumer welfare, and in many cases reduced it. Among the reasons for this conclusion was the fact that special interests were often over-

represented in the regulatory policy-making process, compared to the consumer interest, making predictable but often specious arguments to protect their parochial interest in continuing regulation. Consequently, prices and services in regulated industries departed, often considerably, from those that would have prevailed in the markets that regulators had displaced. Even though those markets were only imperfectly competitive, their performance seemed likely to improve as a result of deregulation. And so, on the whole, it did (Winston; Sam Peltzman, "The Economic Theory of Regulation after a Decade of Deregulation," *Brookings Papers on Economic Activity: Microeconomics*, 1989, 1-41; Roger G. Noll and Bruce M. Owen, *The Political Economy of Deregulation: Interest Groups in the Regulatory Process*, American Enterprise Institute, 1983, at 3-65).

V. Costs of Rate Regulation

68. State regulation of prices charged by CMRS providers would have no benefits. It would, however, result in substantial costs. First, regulated prices would inevitably be below the efficient level in many circumstances. This is inevitable because regulators simply lack the resources to determine what price levels are efficient, and they lack the resources to change regulated prices as cost and demand conditions change. Furthermore, regulators are likely to base regulated prices on faulty economic analysis.

69. Price regulation also limits the ability of regulated firms to respond to changes in technology, cost and demand conditions, and deters new investments, quality improvements, introduction of new services, and entry by reducing returns on pro-competitive activities. The distorting effects of price regulations that limit returns on investments are likely to be greatest in industries such as CMRS that are characterized by rapid growth, technological change, and relatively high risk.

70. In industry after industry, regulation has restricted the introduction of new products and new sources of competition. For example, Commission regulations in the late 1960s and early 1970s delayed the growth of cable television (Owen and Wildman at 215). Other industries

in which regulation was used to prevent or restrict competition include international telecommunications, title insurance, surface freight transportation, and airlines (Owen and Braeutigam; Peltzman).

71. It is also important to remember that government regulations involve substantial administrative costs both for the industries being regulated and for the government.

VI. The Issue of Interim Regulation

72. Connecticut concedes that markets for mobile communications services will be sufficiently competitive in the future as not to require regulation. Connecticut states, "...the cellular carriers' claim of future vigorous competition from other mobile services appears to be persuasive" (Connecticut Petition at 17). Nonetheless, Connecticut wants to regulate in the interim. Such supposedly temporary regulation would be unwise.

73. As shown above, there is no evidence that regulation has been warranted or effective even in the past when the market was quite concentrated. Further, mobile communications services remain in their infancy, with rapidly growing demand and continual product, process, marketing and rate design innovations. This is not a market in which one would expect to find stable cooperative arrangements among the competitors, even if it is assumed that they are duopolists in the relevant market. Moreover, as I discuss in Section V, price regulations impose high costs, particularly in an industry undergoing rapid change.

74. Further, Connecticut is petitioning for broad discretionary authority to engage in a range of regulatory activities, albeit temporarily. In these circumstances, one must consider what Connecticut might do with the authority it requests. Both conceptually and empirically, the economic analysis in the Connecticut petition is very weak. This casts doubt on the resources of Connecticut regulators to carry out behavioral regulation in a way that would be in the public interest. Furthermore, Connecticut apparently views the protection of resellers as an important goal of regulation. Regulation intended to benefit CMRS resellers is likely to harm consumers.

75. Differences in regulation among states may lead cellular firms to distort investment and innovation decisions. A cellular firm operating in more than one state might invest and innovate sooner in states that do not have rate regulation than in states that do. Consumers in regulating states may suffer from these distortions. Furthermore, regulations in some states are likely to have adverse spillover effects in other states that do not regulate. For example, price controls in some states are likely to reduce the returns to improvements in service that would make sense only if they were put into effect in all states in which a carrier operates, and thus such improvements are likely to be deterred or delayed. This outcome does not appear to have been intended by Congress.

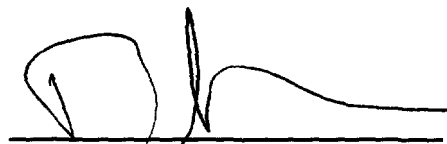
76. For all these reasons, there is ample reason to suspect that even "interim" regulation will be harmful and no convincing evidence that regulation is necessary to cure any existing problem that is within its power to solve.

VII. Conclusion

77. For the reasons given above, I have concluded that decisions on pricing of CMRS services are best left to the market rather than being subjected to state regulation. There is no persuasive evidence that government price controls would have significant benefits, but they would have substantial costs. Approval of continuing state price regulation would therefore be likely to harm consumers. Neither cellular systems nor other CMRS providers have unilateral market power. Regardless of concentration levels, conditions in markets for CMRS are not conducive to successful collusion, and there is no persuasive evidence that CMRS providers have been exercising significant market power. To the contrary, there is evidence of sufficient competition to warrant reliance on market forces rather than government regulation. Moreover, concentration will fall substantially over the next several years. Consequently, there is no empirical basis for believing that there is a problem with market performance that would warrant regulating CMRS pricing. Overall, I conclude there is no basis for the Commission to alter its conclusion that competition is sufficient to justify forbearance with regard to regulation of CMRS pricing.

ing. Nothing about Connecticut requires an exception to these conclusions.

I declare under penalty of perjury that the foregoing is true and correct.

A handwritten signature in black ink, consisting of a large, stylized 'B' followed by a series of loops and a long horizontal stroke extending to the right.

Bruce M. Owen

September 19, 1994

CERTIFICATE OF SERVICE

I, Cherie R. Kiser, do hereby certify that a copy of the foregoing Opposition of McCaw Cellular Communications Corporation was served on the following by hand or first class mail, postage prepaid this 19th day of September, 1994:


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